

1 STEPHEN H. SILVER, SBN 038241  
2 RICHARD A. LEVINE, SBN 091671  
3 JACOB A. KALINSKI, SBN 233709  
4 SILVER, HADDEN, SILVER, WEXLER & LEVINE  
5 1428 Second Street, Suite 200  
6 P.O. Box 2161  
7 Santa Monica, CA 90407-2161  
8 Telephone: (310) 393-1486  
9 Facsimile: (310) 395-5801  
10  
11 Attorneys for Plaintiff/Petitioner San Jose Retired  
12 Employees Association

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
14 **FOR THE COUNTY OF SANTA CLARA**

15 SAN JOSE POLICE OFFICERS' ) Lead Consolidated Case No. 1-12-CV-225926  
16 ASSOCIATION, ) (Consolidated Actions 1-12-CV-225928,  
17 ) 1-12-CV-226570, 1-12-CV-226574,  
18 ) 1-12-CV-227864 and 1-12-CV-233660)  
19 Plaintiff, )  
20 v. ) (Hon. Patricia M. Lucas, Dept. 2)  
21 )  
22 CITY OF SAN JOSE, BOARD OF ) **SAN JOSE RETIRED EMPLOYEES**  
23 ADMINISTRATION FOR POLICE ) **ASSOCIATION'S REQUEST FOR**  
24 AND FIRE DEPARTMENT ) **STATEMENT OF DECISION AND**  
25 RETIREMENT PLAN OF CITY OF ) **ADOPTION OF PROPOSALS NOT**  
26 SAN JOSE, and DOES 1-10, inclusive, ) **INCLUDED IN TENTATIVE DECISION**  
27 )  
28 Defendants. ) (California Rules of Court, Rule 3.1590)

29 )  
30 ) Trial Date: July 22, 2013

31 AND RELATED CROSS-COMPLAINT )  
32 AND CONSOLIDATED ACTIONS. )  
33 )  
34 )  
35 )  
36 )  
37 )  
38 )

1 TO ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD:

2 Pursuant to California Rule of Court 3.1590(c), Plaintiff/Petitioner San Jose Retired  
3 Employees Association (“SJREA”) hereby requests a Statement of Decision on principal  
4 controverted issues as specified below, as well as those other controverted issues included in  
5 the Court’s Tentative Decision, and requests that the Court adopt the following Proposals in its  
6 Statement of Decision.

7 **ADDITIONAL CONTROVERTED ISSUES ON WHICH A STATEMENT OF**  
8 **DECISION IS REQUESTED:**

- 9 1) Whether Section 1512-A(b) of Measure B, Retiree Healthcare, Reservation of  
10 Rights, impairs vested rights of Affected Retirees and Affected Beneficiaries.  
11 2) Whether Section 1511-A of Measure B, Supplemental Retiree Benefit Reserve,  
12 impairs vested rights of Affected Retirees and Affected Beneficiaries.

13 **PROPOSALS NOT INCLUDED IN TENTATIVE DECISION:**

- 14 1) SJREA requests that the Court clarify its Tentative Decision regarding Section  
15 1512-A(b) of Measure B to specify that (a) this provision did not impair the existing vested  
16 rights of Affected Retirees and Affected Beneficiaries to (i) participate in the City’s medical  
17 and dental plans and (ii) receive a subsidy equal to 100% of the premium for the lowest cost  
18 plan provided to active City employees, and (b) SJREA did not present any claim in its lawsuit  
19 that Affected Retirees and/or Affected Beneficiaries earned any vested right to a particular plan  
20 or particular benefit.  
21 2) SJREA requests that the Court replace the portion of the Tentative Decision  
22 commencing at page 2, line 27 through page 27, line 11 with the contents appearing at page 18,  
23 line 18 through page 25, line 2 of SJREA’s Proposed Statement of Decision.

24 **BASIS FOR PROPOSALS:**

25 **A. Measure B, Section 1512-A(b)**

26 As set forth in the Court’s Tentative Decision (at 28:7-8), Section 1512-A(b) of  
27 Measure B provides: “No retiree healthcare plan or benefit shall grant any vested right, as the  
28 City retains its power to amend, change or terminate plan provisions.”

1 SJREA does not understand what the Court means by its statement (at 28:16-19 of the  
2 Tentative Decision) that “The City is correct that ‘[t]his section does not change the status quo  
3 but rather (1) reflects what vested rights already exist, since it does not purport to take them  
4 away. . . .’” The confusion is a result of the fact that there is absolutely no language  
5 whatsoever in Section 1512-A(b) that “reflects what vested rights” retirees currently possess.

6 The basis for SJREA’s challenge to this portion of Measure B was that Affected  
7 Retirees and Affected Beneficiaries had vested rights to participate in the City’s medical and  
8 dental plans with respect to which they are entitled to a subsidy equal to all or a prescribed  
9 portion of the applicable premium, *i.e.*, 100% of the premium for the lowest cost plan provided  
10 to active City employees. If the Court is holding that Section 1512-A(b) of Measure B does not  
11 impair those vested rights to participate in a plan and receive a subsidy because the Court does  
12 not construe either as a “plan or benefit” or a “plan provision”, just a right to participate and a  
13 subsidy, it is important that its decision make this distinction clear. Such an explanation would  
14 coincide with the holding in the Tentative Decision (at 29:21-22) with respect to Section 1512-  
15 A(c) of Measure B which acknowledges that retirees have a vested right to have access to  
16 healthcare benefits that are **fully paid for**.

17 This explanation is important because, as the Tentative Decision points out (at 28:14-  
18 16), SJREA did **not** assert in **this lawsuit any** claim that Affected Retirees and Affected  
19 Beneficiaries had earned any vested right to a particular plan or a particular benefit (assuming  
20 that the rights to participate in a plan and/or receive a subsidy do not qualify as a plan or benefit  
21 within the meaning of Section 1512-A(b) of Measure B).

22 As a result of the foregoing, SJREA urges this Court to specify in its Statement of  
23 Decision that: (1) because it does not regard the vested rights of Affected Retirees and  
24 Affected Beneficiaries to participate in the City’s medical and dental plans and receive the  
25 designated subsidy as a “healthcare plan or benefit” or a “plan provision” within the meaning  
26 of Section 1512-A(b) of Measure B, that enactment did not impair those vested rights; and  
27 (2) SJREA did not assert in its lawsuit any claim that Affected Retirees and/or Affected  
28 Beneficiaries had earned any vested right to a particular plan or a particular benefit.

1           **B.     Measure B, Section 1511-A**

2           The Tentative Decision determined that Affected Retirees and Affected Beneficiaries  
3 did not earn vested rights to (1) have the Retirement Association continue to fund the SRBR  
4 with ten percent of any annual excess earnings and (2) segregate its funds from the other assets  
5 of the Retirement Association for the sole purpose of providing supplemental retirement  
6 benefits to Affected Retirees and Affected Beneficiaries at the discretion of the City Council.  
7 The basis for that decision appears to be a determination that an illogical result would be  
8 produced by a holding that they earned a vested right to funds that could lawfully be withheld  
9 from them by proper exercises of discretion of the City Council.

10           Even if the Tentative Decision correctly construed the situation as being illogical, that  
11 result does not negate the fact that a vested right to that illogical result was earned by the  
12 Affected Retirees and Affected Beneficiaries. There is substantial language in San Jose  
13 Municipal Code (SJMC) Section 3.28.340 making the funding of the SRBR mandatory. This  
14 language strongly supports SJREA's contention that the Affected Retirees and Affected  
15 Beneficiaries were entitled to a **separate** fund that only could be used to provide supplemental  
16 retirement benefits to them. SJMC Section 3.28.340(D)(2) provides in pertinent part:

17           If the balance remaining in the income account is greater than zero, the board  
18 **shall** by written resolution declare that balance to be the excess earnings for the  
19 applicable fiscal year, **shall** transfer ten percent of the excess earnings to the  
20 supplemental retiree benefit reserve, and **shall** transfer the remaining ninety  
percent of the excess earnings to the general reserve. (Emphasis added; Exhibit  
602, REA000294.)

21           The use of the mandatory word "shall" as opposed to the permissive word "may" is a  
22 strong indication that the City intended to permanently "skim" 10% of any annual excess  
23 earnings into the SRBR, from which supplemental benefits could be given to retirees. The  
24 reason the ensuing distribution language is permissive is that the fund was not designed to be  
25 used to automatically provide retirees with more income in years where there were excess  
26 earnings but, instead, was intended to be available for distribution during times when the  
27 entitled COLA was regarded as being insufficient to allow retirees to keep up with inflation.

28           The use of this permissive language vividly demonstrates that the City was aware of

1 how to convey that intent when it so desired. The fact that it did **not** use this type of language  
2 with respect to the funding of the SRBR reveals a clear intent that its funding and its  
3 segregation from the remainder of the Retirement Association's assets was mandatory.

4 The Tentative Decision upholds the destruction of the SRBR because "the assets [of the  
5 SRBR shall be] returned to the appropriate retirement trust fund." (25:11-12.) However, the  
6 flaw in that approach is that it erroneously assumes that, when returned to the general fund  
7 account of the Retirement Association, those assets still could be used to provide the intended  
8 supplemental retirement benefits to Affected Retirees and Affected Beneficiaries.

9 Initially, a significant portion of those funds already has been diverted to benefit the  
10 City by causing the City's contribution rate for the most recent year to be significantly lower  
11 than would have been the case without the transferring of SRBR funds. (RT 693:5-21; 935:28-  
12 936:14.) Further, even if the remainder is eventually used to provide new benefits, because the  
13 Affected Retirees and Affected Beneficiaries have ceased rendering services for the City, those  
14 individuals could no longer earn a vested right to any of those new benefits. Thus, the only  
15 beneficiaries could be current and future City employees.

16 *Claypool v. Wilson* (1992) 4 Cal.App.4th 646, a case which is cited several times in the  
17 Tentative Decision, actually supports SJREA's position that the abolition of the SRBR impairs  
18 vested rights of Affected Retirees and Affected Beneficiaries. *Claypool* involved a challenge to  
19 a statute that repealed three funded supplemental COLA programs, replaced them with a less  
20 costly alternative COLA and directed that the savings realized from the repeal of those  
21 programs be used to offset contributions otherwise due the Public Employees Retirement  
22 System from the employer (the State). (*Id.* at 652.)

23 The *Claypool* Court analyzed whether the statute impaired vested rights with respect to  
24 two distinct groups of people: (1) those who had retired prior to the above enactment and  
25 (2) active employees. (*Id.* at 652, 662, 665.) It did not analyze the rights of individuals who  
26 retired between the creation of the rights and their repeal. As to those persons who retired prior  
27 to the enactment, the Court correctly held that they could not have acquired any vested right to  
28 the supplemental COLAs because they did not exchange services for the right to those benefits.

1 (*Id.* at 662-665.) As to current employees, the Court assumed that these individuals possessed a  
2 vested right to the repealed supplemental COLAs (*id.* at 665), but found that the less costly  
3 alternative COLA program which was part of the statute constituted a new comparable  
4 advantage. (*Id.* at 665-670.)

5 The retirees in *Claypool* argued that changes made for the purpose of saving a public  
6 employer money were invalid per se. The Court disagreed, holding that: “The saving of public  
7 employer money is not an illicit purpose **if changes in the pension program are accompanied**  
8 **by comparable new advantages to the employee.**” (Emphasis added.) (*Id.* at 665) The  
9 Court later qualified that determination by stating: “That is not to say that a purpose to save the  
10 employer money is a sufficient justification for change. **The change must be otherwise**  
11 **lawful and must provide comparable advantages to the employees whose contract rights**  
12 **are modified.**” (Emphasis added.) (*Id.* at 666.)

13 Like *Claypool*, in our case, based on the mandatory language in SJMC 3.28.340,  
14 individuals who retired after the SRBR was adopted earned a vested right to the funding of  
15 SRBR. Prior to their retirement, the City could have offered them comparable advantages  
16 (perhaps, even less costly ones as was the case in *Claypool*). However, changes that were  
17 permissible before retirement cannot occur once an individual has actually retired. (*Terry v.*  
18 *City of Berkeley* (1953) 41 Cal.2d 698, 702-03.) Therefore, the City could not argue that  
19 Affected Retirees who had already retired between the adoption of the SRBR and Measure B  
20 received any comparable advantage.

21 Most importantly, in our case the Affected Retirees and Affected Beneficiaries were **not**  
22 provided **any** comparable advantages to offset the loss of the opportunity to receive SRBR  
23 distributions.

24 Furthermore, SJREA strongly disagrees with the statement in the Tentative Decision (at  
25 24:6-8) that “[The cost of skimming excess earnings] was not taken into account until 2011  
26 when actuaries assigned and subtracted a cost for the SRBR. (RT at 290-92 (Lowman); 967-  
27 68, 971-72 (Bartel).)” This statement is inaccurate and not supported by the evidence.

28 Mr. Bartel testified that, in his view, historically the SRBR was not *properly* funded

1 (RT 966:27-967:12.). However, he recognized that the SRBR **was** initially funded (RT 974:20-  
2 975:5), though in his belief, there was “little rigor” in the calculation of what its impact on  
3 contribution rates would be. (RT 966:27-967:12.) Furthermore, although Mr. Lowman  
4 initially testified at RT 290-92 that he believed that the City began funding the SRBR in 2011,  
5 he later recognized that a cost **had been assigned** to the SRBR at the time of its establishment.  
6 (RT 301:8-311:2.)

7         It is undisputed that the Federated City Employees Retirement System Annual Reports  
8 for 1985-1986 and 1986-1987 show the employees and the City each contributing a percentage  
9 of income to fund the SRBR (over and above the 10% of excess earnings mandated by SJMC  
10 3.28.340). (Exhibit 650, REA000717 and Exhibit 651, REA000781.) Federated City  
11 Employees’ Retirement System Resolution No. 2002 (Exhibit 645, SJ002165-SJ002167) also  
12 illustrates that members were then contributing .06% of their income and the City was  
13 contributing .17% of income in order to fund the SRBR. (Exhibit 645, SJ002166.) Moreover,  
14 Exhibit 5701, to which the Court cites in its Tentative Decision (at 23:22-25) , states “Coates,  
15 Herfurth & England, the Board’s actuary, has reviewed the SRBR proposal and they have  
16 estimated the cost at .23% of payroll on a ten year funding basis.” That same Exhibit also  
17 states that, while 10% of excess earnings will go to the SRBR, “[t]he remaining 90% would be  
18 transferred to a benefits payable account which would be used to help offset any future rate  
19 increases.”

20         In sum, there is no doubt that the City was aware that “skimming” 10% of excess  
21 earnings had a cost and that the City required its employees to pay what the actuaries  
22 determined to be their share of that cost. The City also was aware that the vast majority of the  
23 annual excess earnings (90%) would be available to offset years where there were negative  
24 earnings or even losses. Therefore, the Tentative Decision’s validation of Section 1511-A  
25 because it remedies “unforeseen burdens” is contrary to the evidence.

26         It may not have been until 2011 that the City began to *properly* fund the SRBR, but  
27 there is no authority that makes the entitlement to a vested pension benefit contingent on that  
28 benefit being properly funded. In *United Firefighters of Los Angeles City v. City of Los*

1 *Angeles* (1989) 210 Cal.App.3d 1095, 1112-13, the court held that emergency impairments of a  
2 pension benefit cannot be implemented to repair errors and omissions where the governmental  
3 entity failed to conform to sound actuarial practices, referencing the Court's appreciation of  
4 that concept in *Sonoma County Organization of Public Employees v. County of Sonoma* (1979)  
5 23 Cal.3d 296, 313.) Based on that holding, it makes no sense to deny the creation of a vested  
6 right on the same grounds. The Affected Retirees and Affected Beneficiaries earned their  
7 vested right to the SRBR upon its establishment in 1986. The City cannot undo the SRBR by  
8 subsequently failing to properly fund it.

9 The Court's analogy of the failure to properly fund a benefit to the failure to predict an  
10 increase in entitled allowances that were tied to salaries of then current employees (which, to  
11 everyone's surprise, dramatically increased) that was present in *Allen v. Board of*  
12 *Administration of the Public Employees Retirement System* (1983) 34 Cal.3d 114 is without  
13 merit. Any failure to properly fund the SRBR is the result of the negligence of actuaries in  
14 failing to account for contingencies that were or should have been foreseen. On the other hand,  
15 the failure to predict a complete overhaul in the method of compensating current employees  
16 whose salaries influence allowances of retirees is the result of being unable to guess the future.  
17 If vested rights can be taken away whenever actuarial failure exists, municipalities have little  
18 incentive to make sure the process is done correctly.

19 The Tentative Decision's citation to evidence (Exhibits 5703 and 5704) showing that  
20 the City considered eliminating (but did not eliminate) the SRBR if it did not adequately fund  
21 contemplated new benefits is irrelevant to the question of whether Affected Retirees and  
22 Affected Beneficiaries had a vested right to the funding of the SRBR and to discretionary  
23 distributions from it.

24 Finally, at 23:16-21, the Tentative Decision rejects "Plaintiffs' challenge with respect to  
25 any retiree who 'retired prior to the effective date' when the SRBR came into effect." SJREA  
26 did not assert any such claim in its operative First Amended Petition or at trial. Instead, SJREA  
27 and the City stipulated that claims made by individuals who retired prior to the effective date of  
28 any particular benefit would be dismissed without prejudice. The Court approved this

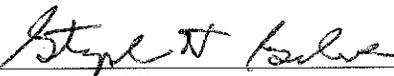
1 Stipulation. Therefore, it is inappropriate to include in this lawsuit any binding ruling as to  
2 these individuals.

3 Accordingly, SJREA requests that the Court replace the portion of the Tentative  
4 Decision commencing at page 2, line 27 through page 27, line 11 with the contents appearing at  
5 page 18, line 18 through page 25, line 2 of SJREA's Proposed Statement of Decision.

6 Respectfully submitted,

7 SILVER, HADDEN, SILVER, WEXLER & LEVINE

8  
9 Date: December 30, 2013

By 

STEPHEN H. SILVER

Attorneys for Plaintiff/Petitioner San Jose Retired  
Employees Association

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1428 Second Street, P.O. Box 2161, Santa Monica, California 90407-2161.

On December 30, 2013, I served the document(s) described as **SAN JOSE RETIRED EMPLOYEES ASSOCIATION'S REQUEST FOR STATEMENT OF DECISION AND ADOPTION OF PROPOSALS NOT INCLUDED IN TENTATIVE DECISION** on the parties in this action by delivering a true copy thereof as shown below addressed as set forth on the attached service list.

**[By Mail]** By placing a true copy in a sealed envelope. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, on the same day that correspondence is placed for collection and mailing, it would be deposited with the U.S. Postal Service with postage thereon fully prepaid at Santa Monica, California, in the ordinary course of business. I am aware than on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

**[By Personal Service - via Magnum Courier]** I caused the above document to be personally delivered to the party represented by an attorney. Delivery was made to the attorney or at the attorney's office by leaving the document, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office.

**[By Electronic Mail]** I caused the document(s) to the addressee(s) via electronic mail at the addresses shown on the attached service list..

**[By Facsimile Transmission]** I caused the above-referenced document to be transmitted to the named person(s) via facsimile transmission to the fax number(s) set forth above from a fax machine at (310) 395-5801.

**[By Overnight Mail]** I delivered said documents to an authorized courier or driver authorized to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served for delivery on the next business day.

Executed on December 30, 2013, at Santa Monica, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

\_\_\_\_\_  
LISA L. HILL

  
\_\_\_\_\_  
Signature

SERVICE LIST

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Gregg M. Adam  
[gadam@cbmlaw.com](mailto:gadam@cbmlaw.com)  
Jonathan Yank  
[jyank@cbmlaw.com](mailto:jyank@cbmlaw.com)  
Amber West  
[awest@cbmlaw.com](mailto:awest@cbmlaw.com)  
Carroll Burdick & McDonough LLP  
44 Montgomery Street, Suite 400  
San Francisco CA 94104

Teague P. Paterson  
[tpaterson@beesontayer.com](mailto:tpaterson@beesontayer.com)  
Vishtasp M. Soroushian  
[vsoroushian@beesontayer.com](mailto:vsoroushian@beesontayer.com)  
Beeson Taylor & Bodine APC  
Ross House, Suite 200  
483 Ninth Street  
Oakland, CA 94612

John A. McBride  
[jmcbride@wmpirlaw.com](mailto:jmcbride@wmpirlaw.com)  
Christopher E. Platten  
[cplatten@wmpirlaw.com](mailto:cplatten@wmpirlaw.com)  
Wylie McBride Platten & Renner  
2125 Canoas Garden Avenue, Suite 120,  
San Jose, CA 95125-2124

Arthur A. Hartinger  
[ahartinger@meyersnave.com](mailto:ahartinger@meyersnave.com)  
Linda Ross  
[lross@meyersnave.com](mailto:lross@meyersnave.com)  
Meyers Nave Riback Silver & Wilson  
555 12th Street, Suite 1500,  
Oakland, CA 94607

Harvey L. Leiderman  
[hleiderman@reedsmith.com](mailto:hleiderman@reedsmith.com)  
Jeffrey R. Rieger  
[jrieger@reedsmith.com](mailto:jrieger@reedsmith.com)  
Reed Smith LLP  
101 Second Street, Suite 1800,  
San Francisco, CA 94105-3659

George Nathan Jaeger  
[njaeger@natejaeger.com](mailto:njaeger@natejaeger.com)  
15118 San Jose Street  
Mission Hills, CA 91345